

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1903.

No. 1372.

HERMAN SCHROT AND CHARLES SCHROT, TRADING AS
SCHROT BROTHERS, AND HERMAN SCHROT, GAR-
NISHEES OF NEW YORK JOURNAL, APPELLANTS,

vs.

HERMAN SCHOENFELD.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

HERMAN SCHROT ET AL., Appellants, }
vs. } No. 1372.
HERMAN SCHOENFELD. }

a Supreme Court of the District of Columbia.

HERMAN SCHOENFELD }
vs. }
HERMAN SCHROT and CHARLES SCHROT, } No. 46026. At Law.
Trading as Schrot Brothers, and Herman }
Schrot, Garnishees of New York Journal. }

UNITED STATES OF AMERICA, } ss:
District of Columbia, }

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 Summons.

Filed February 17, 1903.

46026.

DISTRICT OF COLUMBIA, } ss:
Washington County, }

The President of the United States to the U. S. marshal, Greeting:

Summon New York Journal Association a corporation, under the laws of New York—to be and appear before me, the subscriber, a justice of the peace, in and for the District aforesaid, on the 22nd day of October, A. D. 1902, at 2 o'clock p. m., to answer unto the complaint of Herman Schoenfeld, in a plea of debt of \$50.00.

Given under my hand and seal this 15th day of October, 1902.

CHARLES S. BUNDY,
Justice of the Peace. [SEAL.]

No. 416–18, 5th St. N. W., Columbian building.

E. HILTON JACKSON,
Pl'tff's Att'y.

Marshal's Return.

Oct. 15, 1902.

2 Summonee as within directed by handing to and leaving a copy of this writ with M. F. Tighe, manager N. Y. Journal Ass'n.

AULICH PALMER, U. S. M.,
Per B. EMERSON, D'p'y M.

Nov. 8, 1892.

Judgment for plaintiff for \$50, debt on interest from —, with \$3.40 costs.

CHAS. S. BUNDY, J. P. [SEAL.]

46026.

DISTRICT OF COLUMBIA, }
Subdistrict No. 1, } *To wit:*

The President of the United States to the U. S. marshal in and for the District of Columbia, Greeting:

Summon F. I. Whitehead, N. Y. Journal Ass'n—filed February 17, 1903—to be and appear before me, the subscriber, a justice of the peace in and for subdistrict aforesaid, on the 25th day of October, A. D. 1902, at 3 o'clock p. m., to answer as a witness for the defendant in the case of Herman Schoenfeld *versus* N. Y. Journal Association in a plea of debt of \$50.

Given under my hand and seal this 25 day of October A. D. 1902.

CHARLES S. BUNDY, J. P., [SEAL.]
Subdistrict No. 1, 416-18 5th Street N. W.,
Columbian Building.

[Endorsed:] Summons. No. —. — — —, plaintiff *vs.* — — —, defendant. Oct. 25, 1902. Summoned as within directed. Aulick Palmer, U. S. marshal. B. Emerson, deputy marshal. — — —, 190—. Judgment for — — — for \$— debt on interest from — — —, with \$— costs. — — —, J. P. [Seal.] Charles S. Bundy, justice of the peace, subdistrict No. 1, Nos. 416-18 5th St. N. W., Washington, D. C.

3

Special Plea, &c.

Filed February 17, 1903.

In Justice's Court, Before Charles S. Bundy, J. P.

HERMAN SCHOENFELD	}	No. 1286. 46026.
vs.		
NEW YORK JOURNAL ASS'N, a Corporation under the Laws of New York.		

For plea the defendant says :
Nul tiel corporation.

FRANK D. BLACKISTONE,
 S. HERBERT GIESY,
*Counsel for Defendant, Appearing Specially
 for the Purpose of This Plea.*

Stipulation of Counsel.

Filed February 17, 1903.

In a Justice's Court, Before C. S. Bundy.

SCHOENFELD	}	At Law. No. 1286. 46026.
vs.		
NEW YORK JOURNAL ASSOCIATION.		

On the hearing on the attachment in this cause issued against Schrot Bros. it is this 28th day of January, A. D. 1903, hereby stipulated between counsel herein :

4 1. That the testimony of Carvalho in the case of Werner v. Hearst reported in volums 78—No. 10 on page 788 of the National Reporter System shall be used in this cause to the same extent as if said testimony had been given under a commission or otherwise, subject to the privilege of calling Mr. Cavalho in case of appeal.

2. That the garnishees Schrot Bros. are indebted to the Star Company a corporation created under and by virtue of the laws of New York in the sum of more than enough to satisfy judgment herein and costs.

E. HILTON JACKSON,
Att'y for Plaintiff.
 S. HERBERT GIESY,
Att'y for Schrot Brothers.

5

Attachment on Judgment.

Filed February 17, 1903.

DISTRICT OF COLUMBIA,
Subdistrict Number 1, } *To-wit:*

In justice's court, before Charles S. Bundy, a justice of the peace in and for subdistrict No. 1 of the District aforesaid, in the case of—

HERMAN SCHOENFELD, Plaintiff, }
vs. } At Law. No. 1286. 46026.
 NEW YORK JOURNAL, Defendant. }

The President of the United States to the United States marshal in
and for the District of Columbia, Greeting:

You are hereby commanded to attach the goods, chattels, lands and tenements, rights and credits of the defendant, ———, if to be found in this District, of value sufficient to satisfy the plaintiff's recovery against him in this action, on the 6th day of November 1902, of fifty dollars, (\$50.00) for debt and damages, and interest from the 6th day of November 1902 and three & 40/100 dollars (\$3 ⁴⁰/₁₀₀) costs of suit, and the same so attached safely keep and have before me in ten days after the service hereof, exclusive of Sundays and legal holidays, that the same may be condemned, unless sufficient cause be shown to the contrary; and if said goods, chattels, lands and tenements, rights or credits be attached in the hands of or in the possession of any person other than the defendant, notify such person to appear before me at the time last aforesaid, to show cause why the same should not be condemned and execution thereof made, by delivering to him a copy of this writ and interrogatories hereto annexed.

Witness my hand and seal this 27th day of December, A. D. 1902.

CHARLES S. BUNDY, [SEAL.]
Justice of the Peace.

HERMAN AND CHARLES SCHROT,
Trading as Schrot Bros., Garnishees.

Interrogatories to be Answered by the Garnishee.

1. Whether they or either of them was at the time of garnishment, indebted to the defendant; if so, how and in what amount?
2. Whether they, or either of them has, now, or had, at the time of serving the notice, or ha- had at any time between the date of

service and the time of answering, any goods, chattels, or credits of the defendant? they or either of them.

3. Whether he was or is, indebted to the "New York Journal" or the "New York Evening Journal" or the "New York American" as set forth in interrogatories (1) one and (2) two herein.

Answers.

1 interrogatory. No.
2 " No.
3 " No. I am indebted as one of the partners of Schrot Brothers to the Star Company sufficient to cover amount of this suit & costs.

HERMAN SCHROT.

Sworn to and subscribed before me, the 8th day of January, 1903.

HARRY H. HOLLANDER, [SEAL.]
Notary Public, D. C.

NOTE.—To be answered under oath, and returned to this court before the expiration of ten days from the service hereof.

7 Endorsed: January 28, 1903. Judgment of condemnation of credits in hands of garnishee to satisfy within described judg't and all costs.

Attachment on Judgment.

Filed February 17, 1903.

DISTRICT OF COLUMBIA, }
Subdistrict Number 1, } *To wit:*

In justice's court, before Charles S. Bundy, a justice of the peace in and for subdistrict No. 1 of the District aforesaid, in the case of—

HERMAN SCHOENFELD, Plaintiff, }
vs. } At Law. No. 1286. 46026.
NEW YORK JOURNAL, Defendant. }

The President of the United States to the United States marshal in and for the District of Columbia, Greeting:

You are hereby commanded to attach the goods, chattels, lands and tenements, rights and credits of the defendant, if to be found in this District, of value sufficient to satisfy the plaintiff's recovery against him in this action, on the 6th day of November 1902, of fifty dollars, (\$50) for debt and damages, and interest from the 6th day of November, 1902 and three and 40/100 dollars, (\$3.40) costs of suit,

and the same so attached safely keep and have before me in ten days after the service hereof, exclusive of Sundays and legal holidays, that the same may be condemned, unless sufficient cause be shown to the contrary; and if said goods, chattels, lands and tenements, rights or credits be attached in the hands of or in the possession of any person other than the defendant, notify such person to appear before me at the time last aforesaid, to show cause why the same should not be condemned and execution thereof made, by delivering to him a copy of this writ and interrogatories hereto annexed.

Witness my hand and seal this 27th day of December, A. D. 1902.

CHARLES S. BUNDY, [SEAL.]
Justice of the Peace.

HERMAN AND CHARLES SCHROT,
Trading as Schrot Bros., Garnishees.

Interrogatories to be Answered by the Garnishee.

1. Whether they or either of them, was at the time of garnishment, indebted to the defendant; if so, how and in what amount?

2. Whether they or either of them has now, or had, at the time of serving the notice, or had at any time between the date of service and the time of answering, any goods, chattels, or credits of the defendant?

3. Whether they or either of them was or is indebted to the "New York Journal" or the "New York Evening Journal" or the "New York American" as set forth in interrogatories (1) one and (2) two herein.

Answers.

Sworn to and subscribed before me the — day of —, 190—.

Justice of the Peace. [SEAL.]

NOTE.—To be answered under oath, and returned to this court before the expiration of ten days from the service hereof.

DECEMBER 27, 1902.

Attached credits in the hands of Herman Schrot and Charles Schrot trading as Schrot Bros. also Herman Schrot in his individual capacity, and served Herman Schrot with copies of this writ and interrogatories as garnishee of defendant.

AULICK PALMER,
U. S. Marshal, D. C.,
By VIRGIL G. WILLIAMS, *Deputy.*

JANUARY 28, 1903.

Judg't of condemnation of sufficient credits in hands of garnishee to satisfy this judg't.

CHARLES S. BUNDY,
Justice of the Peace in and for Subdistrict No. 1
of the District of Columbia.

10

Notice of Appeal.

Filed February 17, 1903.

DISTRICT OF COLUMBIA, *To wit:*

In justice's court, before Charles S. Bundy, a justice of the peace in and for the District of Columbia, the 7th day of February, A. D. 1903.

HERMAN SCHOENFELD, Plaintiff,	} No. 1286. Judgment for
<i>vs.</i>	
SCHROT BROTHERS, Garnishees, ET AL., Defendants.	
	Debt for \$50 and Costs. 46026.

You are hereby notified that I have on the 4th, day of February A. D. 1903, filed with the said court a motion and bond for an appeal from the judgment of said justice in the above entitled cause, and that I shall, on Wednesday, the 11th, day of February, A. D. 1903, at the hour of 10:00 a. m. at the office of said justice, in the Columbian building, in Washington city, District of Columbia, offer the United States Fidelity and Guarantee Company, having its office at 1423 New York Ave., city of Washington, District of Columbia, as surety on said bond.

FRANK D. BLACKISTONE.
S. HERBERT GIESY.

Attest: ———, J. P. [SEAL.]

Service accepted this 7th day of February, A. D. 1903.

E. HILTON JACKSON.

Endorsed.

DISTRICT OF COLUMBIA, ss:

11 I, Frank D. Black-stone, on oath depose and say that, on the 7th, day of Febr'y A. D. 1903, I served a true copy of the within notice on E. Hilton Jackson, Esq., attorney for plaintiff.

FRANK D. BLACKISTONE.

Subscribed and sworn to before me this 7th day of February, 1903.

CHARLES S. BUNDY,
Justice of the Peace in and for Subdistrict No. 1
of the District of Columbia.

Filed February 17, 1903.

DISTRICT OF COLUMBIA, *To wit* :

In justice's court, before Charles S. Bundy, a justice of the peace in and for the District of Columbia, the 4th day of February, A. D. 1903.

HERMAN SCHOENFELD, Plaintiff,	}	46026. Judgment for Debt for \$50 & Costs.
vs.		
SCHROT BROTHERS, Garnishee, ET AL., Defendant-.		

To E. Hilton Jackson :

You are hereby notified that I have this 4th day of February, A. D. 1903, filed with said court a motion and bond for an appeal from the judgment of said justice in the above entitled cause, and that I shall on Saturday the 7th day of February A. D. 1903, at the hour of 10 o'clock a. m., at the office of said justice, Columbian building in Washington city, District of Columbia, offer the United States Fidelity and Guaranty Company as surety on said bond.

S. HERBERT GIESY.

FRANK D. BLACKISTONE. [SEAL.]

Attest :

— — —, J. P. [SEAL.]

[Endorsed:] Notice of appeal. — — — plaintiff vs. — — — defendant District of Columbia, ss. I, Frank D. Blackistone on oath, depose and say, that on the 4th day of February A. D. 1903 I mailed a true copy of the within notice on appeal addressed post-paid, to E. Hilton Jackson, Esq., 416 5th St. N. W. Washington, D. C. Frank D. Blackistone. Sworn to, and subscribed before me this 5th day of February A. D. 1903. Charles S. Bundy [SEAL.]

12

Special Appearance.

Filed February 17, 1903.

46026.

E. Hilton Jackson, attorney for the plaintiff herein appears specially this 7th day of February, A. D. 1903 for the purpose of objecting to the sufficiency of notices served upon him by counsel for Schrot Bros. that a certain party would be offered as surety herein, and said Jackson appeared for no other purpose.

E. Hilton Jackson, att'y for plaintiff herein appears specially this 11th day of February 1903 for the purpose of objecting to the sufficiency of notices served upon him by counsel for Schrot Bros. that a certain party would be offered as surety herein and said Jackson appeared for no other purpose.

13

Appeal Bond.

Filed February 17, 1903.

DISTRICT OF COLUMBIA, *To wit* :

In justice's court, before Charles S. Bundy, one of the justices of the peace, in and for the District aforesaid, in the case of—

HERMAN SCHOENFELD, Plaintiff,

vs.

NEW YORK JOURNAL ASSOCIATION, a Corporation under } No. 46026.
the Laws of New York ; Schrot Brothers, and Herman }
Schrot, Garnishees, Defendants. }

The defendants garnishees having prayed an appeal to the supreme court of the District of Columbia, from the judgment rendered against them on the 28th day of January, A. D. 1903, in the above action, by said justice for \$50 current money, and \$6.40 / 100 cost of the suit they and their sureties, do hereby undertake for themselves, and each of them, their and each of their heirs and personal representatives, to satisfy and pay all intervening damages and costs arising on said appeal.

HERMAN SCHROT, [l. s.]

Of and for Schrot Brothers.

HERMAN SCHROT. [L. s.]

THE UNITED STATES FIDELITY
& GUARANTY CO.,By J. S. SWORMSTEDT, *Attorney in Fact.* [l. s.]

Signed, sealed and acknowledged before me, this 11th day of February, A. D. 1903.

CHARLES S. BUNDY, *J. P.*, [L. s.]

*Justice of the Peace in and for Subdistrict
No. 1 of the District of Columbia.*

14

Certificate of J. P. on Appeal.

Filed February 17, 1903.

DISTRICT OF COLUMBIA, *To-wit* :

In justice's court, before Charles S. Bundy, one of the justices of the peace in and for the District aforesaid, this 12th day of February, A. D. 1903, in the case of—

HERMAN SCHOENFELD, Plaintiff,	} At Law. No. 1286. 46026. Action for debt for \$50.00/100.
vs.	
NEW YORK JOURNAL ASSOCIATION, Defendant.	

Date.	Proceedings.
1902.	
October 15.	Deposit for costs \$2 ¹⁵ / ₁₀₀
" "	Issued summons, returnable Oct. 22, 2 p. m.
" "	Summons returned served by handing to and leaving with M. F. Tigh, manager N. Y. Journal Association.
" 22.	Parties appeared and continued to Oct. 25, 2 p. m.
" 25.	Issued subpoena for def't.
" "	Parties appeared and cause continued to Oct. 30, 3 p. m.
" 30.	Parties appeared and defendant filed plea of <i>nul tiel corporation</i> in bar.
" "	The nature and effect of this plea was argued by counsel and submitted. Court held that it was in effect a plea of misnomer and that defendant should give the plaintiff a better writ which he refused to do. Appeal noted by defendant, but appeal was afterwards abandoned.
Nov. 4.	Parties again appeared and joined issued on plea of <i>nil dibet</i> , and testimony heard. Continued to Nov. 6, 4 p. m.
Nov. 6.	Parties again appeared, and trial resumed, and concluded; cause argued by counsel and submitted. Cont'd for judg't to Nov. 8, 4 p. m.
Nov. 8.	Parties again appeared and judgment entered for plaintiff for \$50 debt and \$3.40 costs.
Dec. 27.	Issued attachment on judg't for credits in hands of Herman & Charles Schrot, trading as Schrot Bros.
Jan'y 8.	Garnishees answer credit sufficient to pay judg't debt and costs.
January 28.	After full argument by counsel credits condemned to use of this judg't.
Feb'y 11.	Appeal from judgment of condemnation perfected.

NOTE.—Plaintiff's attorney appeared specially in all proceedings relating to approval of appeal bond, in accordance with annexed special appearance.

CHARLES S. BUNDY, [SEAL.]
J. P., No. 416-18 5th St. N. W., *Columbian Building*.

15 I, Charles S. Bundy, one of the justices of the peace, in and for the said county and District, do hereby certify that the foregoing is a true statement from my docket of all the proceedings had before me in the above cause, and that the annexed are all the original papers therein.

Given under my hand and seal this 12th day of February A. D. 1903.

CHARLES S. BUNDY, J. P., [SEAL.]
No. 416-18 5th St. N. W., *Columbian Building*.

Cost paid by plaintiff \$6.40.
Cost paid by defendant, \$2.35.

Memoranda.

February 17, 1903.—Summons issued to appellees.

“ returned “ not served because marshal's fee not paid.”

March 6, 1903.—Second summons issued by order of attorney for appellant, and returned served on appellee.

16 *Motion to Dismiss Appeal.*

Filed March 6, 1903.

In the Supreme Court of the District of Columbia.

HERMAN SCHOENFELD

vs.

HERMAN SCHROT and CHARLES SCHROT, Trading as } No. 46026.
Schrot Brothers, and Herman Schrot, Garnishees of }
the New York Journal.

Now comes the appellee, Hermann Schoenfeld, by his attorney, E. Hilton Jackson, and moves the court to dismiss the appeal filed herein for that—

1. The appellant has not complied with the provisions of the Code of the District of Columbia, governing such appeal.

2. The appellant has neglected to pay the marshal's fee for serving the summons upon the appellee herein, as will more fully appear upon reference to the record in this case.

E. HILTON JACKSON,
Attorney for the Appellee.

S. Herbert Giesy, Esq., attorney for the appellant :

Notice is hereby given that I shall call up the above motion for a hearing before his honor, Mr. Justice Clabaugh, in circuit court No. 2, on Friday, March 18th, A. D. 1903, at 10 a. m., or as soon thereafter as counsel may be heard.

E. HILTON JACKSON,
Attorney for the Appellee.

Motion for Leave to Amend Appeal Bond.

Filed May 4, 1903.

Supreme Court of the District of Columbia.

HERMAN SCHOENFELD	}	Law. No. 46026.
vs.		
NEW YORK JOURNAL ASSOCIATION, a Corpora-		
tion under the Laws of New York ; Schrot Brothers, and Herman Schrot, Garnishees.		

Now come the defendant-, garnishees, Schrot Brothers and Herman Schrot, and by their attorneys S. Herbert Giesy and Frank D. Blackistone, in open court, move for leave to amend the appeal bond in this cause given, and tender to the court and file herewith an amended bond, in form as by the rules prescribed.

S. HERBERT GIESY,
FRANK D. BLACKISTONE.

E. Hilton Jackson, Esq.:

Please take notice that I have this day May 4, 1903 moved in open court when you were present the motion hereinbefore set forth, and have filed the same in the above entitled cause.

S. HERBERT GIESY,
FRANK D. BLACKISTONE.

Service of copy of the above motion accepted this 4th day of May, 1904.

E. HILTON JACKSON,
Att'y for Plaintiff.

18

Undertaking on Appeal.

Filed May 4, 1903.

DISTRICT OF COLUMBIA, *To wit:*

In justice's court, before Charles S. Bundy, one of the justices of the peace in and for the District aforesaid, in the case of—

HERMAN SCHOENFELD, Plaintiff,

vs.

NEW YORK JOURNAL ASSOCIATION, a Corporation under the Laws of New York; Schrot Brothers, and Herman Schrot, Garnishees, Defendant-.

At Law. No. 1286.

The defendants garnishees desiring to appeal from the judgment of the justice of the peace rendered against them in the above-entitled cause, on the 28th day of January, 1903, to the supreme court of the District of Columbia, they and the United States Fidelity & Guaranty Co. a corporation of the State of Maryland their surety, hereby appearing and submitting to the jurisdiction of the said supreme court, undertake jointly and severally to pay and satisfy whatever final judgment may be recovered against them in the said court, which judgment may be entered against them jointly or either of them separately in this case.

Given under our hands this 4th day of February, 1903.

HERMAN SCHROT,

[SEAL.]

*Of and for Schrot Brothers.*THE UNITED STATES FIDELITY
& GUARANTY CO.,By J. M. SWORMSTEDT, *Attorney in Fact.*

[SEAL.]

HERMAN SCHROT.

[SEAL.]

Taken and acknowledged before me and by me approved this
11th day of February A. D. 1903

— —, *J. P.* [SEAL.]

19 Supreme Court of the District of Columbia.

MONDAY, *May 4th*, 1903.

Session resumed pursuant to adjournment, Hon. Harry M. Cla-
baugh, justice, presiding.

* * * * *

HERMANN SCHOENFELD, Pl't'ff (Appellee),	} No. 46026. At Law.
<i>vs.</i>	
HERMAN SCHROT and CHARLES SCHROT,	
Trading as Schrot Brothers, and Herman Schrot, Garnishees of The New York Journal (Appellants), Def'ts.	

Upon consideration of the motion filed herein, March 6th, 1903, on behalf of Hermann Schoenfeld, by his attorney Mr. E. Hilton Jackson, to dismiss the appeal filed herein, it is ordered that the same be and it is hereby granted; and said appeal is dismissed. Whereupon, the appellant- Schrot Brothers by their attorney Mr. S. Herbert Giesy, move in open court for leave to file an amended bond, and is instructed by the court to file such motion in writing.

Supreme Court of the District of Columbia.

TUESDAY, *June 23d*, 1903.

Session resumed pursuant to adjournment, Hon. Harry M. Cla-
baugh, chief justice, presiding.

* * * * *

20 HERMAN SCHOENFELD, Plaintiff,	} No. 46026. At Law.
<i>vs.</i>	
NEW YORK JOURNAL ASSOCIATION, a Corpo-	
ration under the Laws of New York; Schrot Brothers, and Herman Schrot, Garnishees, Defendants.	

Upon consideration of the motion filed herein May 4th, 1903, on behalf of the defendants Schrot Brothers and Herman Schrot, by their attorneys S. Herbert Giesy and Frank D. Blackistone, for leave to amend the appeal bond herein, it is ordered that said motion be, and the same is hereby overruled; and it appearing that the appeal herein was dismissed by order of this court on May 5th, 1903. It is considered and adjudged that the plaintiff Herman Schoenfeld recover against the defendants Schrot Brothers and Herman Schrot, his costs herein, to be taxed by the clerk, and have execution therefor, and further that the papers herein be returned to the justice of the peace from whence they came, with instructions to proceed thereon according to law. Thereupon the said defendants by their

said attorneys in open court, note an appeal to the Court of Appeals of the District of Columbia, and prays that bond be fixed; whereupon, it is ordered, that said defendants shall furnish a supersedeas bond on such appeal herein, with surety or sureties to be approved by this court, in the sum of one hundred (100) dollars.

21

Memorandum.

July 16, 1903.—Appeal bond filed.

Order for Transcript of Record.

Filed August 10, 1903.

In the Supreme Court of the District of Columbia.

HERMAN SCHOENFELD

vs.

HERMAN SCHROT and CHARLES SCHROT, Trading as Schrot Brothers, and Her- man Schrot, Garnishees of New York Journal, Appellants.	}	At Law. No. 46026.
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The clerk will please prepare the transcript of the record for the Court of Appeals in the above entitled cause and include therein:

The certificate of the justice of the peace on appeal and accompanying papers.

Order for second summons filed March 6, 1903.

" " " " served " " "

Motion to dismiss appeal.

" for leave to amend appeal bond, and accompanying bond tendered the court.

Order of court of May 4, 1903 M. 44 page 50.

22 Order of court of June 23, 1903 M. 44 page 84.

S. HERBERT GIESY.

FRANK D. BLACKISTONE.

Service of copy of above accepted this 10th day of August, 1903.

E. HILTON JACKSON,

Attorney for Schoenfeld,

Per R. A. FORD.

Memorandum.

August 26, 1903.—Time to file transcript of record extended to October 15, 1903.

Stipulation.

Filed Oct. 15, 1903.

In the Supreme Court of the District of Columbia.

HERMAN SCHOENFELD

vs.

HERMAN SCHROT and CHARLES SCHROT,
 Trading as Schrot Brothers, and Herman
 Schrot, Garnishees of New York Journal,
 Appellants.

At Law. No. 46026.

At the request of Chief Justice Clabaugh, holding circuit court No. 2 it is hereby stipulated between counsel in this cause that the amended bond tendered to the court with the motion for leave to amend the appeal bond in this cause given, while dated on the 4 day of February was in fact not executed till the 4 day of May when the motion for leave to amend was in this cause filed.

S. HERBERT GIESY,

FRANK D. BLACKISTONE,

Attorneys for Appellants.

E. HILTON JACKSON,

Attorney for Appellee.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 23, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this record, in cause No. 46,026, at law, wherein Herman Schoenfeld is plaintiff, and Herman Schrot and Charles Schrot, trading as Schrot Brothers and Herman Schrot, garnishees of New York Journal, are defendants, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe
 my name and affix the seal of said court, at
 the city of Washington, in said District, this
 15th day of October, A. D. 1903.

Seal Supreme Court
 of the District of
 Columbia.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1372. Herman Schrot *et al.*, appellants, *vs.* Herman Schoenfeld. Court of Appeals, District of Columbia. Filed Oct. 15, 1903. Robert Willett, clerk.

Court of Appeals District of Columbia.

JANUARY TERM, 1901.

HERMAN SCHROEDER and CHARLES SCHROEDER,
Trading as Schroeder Brothers, and
HERMAN SCHROEDER, Garnishees of
New York Journal, Appellants. No. 1372.
vs.
HERMAN SCHROENFELD

BRIEF FOR APPELLEE.

E. HILTON JACKSON,

Attorney for Appellee.

Court of Appeals District of Columbia.

JANUARY TERM, 1904.

HERMAN SCHROT and CHARLES SCHROT, Trading as SCHROT BROTHERS, and HERMAN SCHROT, Garnishees of New York Journal, Appellants, <i>vs.</i> HERMAN SCHOENFELD.	}	No. 1372.
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In so far as this appeal is from the order of the court below in refusing leave to appellants to file an amended bond, the action of the trial court in the allowance or the refusal of leave to so amend is discretionary, and is not reviewable on appeal.

Meyer *vs.* Davis, 13 App. D. C., 361;
German, etc., Cemetery, 2 App. D. C., 310;
Chapman *vs.* Barney, 129 U. S., 677, 681.

It is submitted that error assigned should have been the order of the court below in dismissing defendant's appeal for non-compliance with the provisions of the Code governing such appeal (Record, 11) and not on *sole* ground of defect in appeal bond as erroneously set forth by appellants in their assignment of error.

The court in passing the order dismissing appeal declined to consider whether in other respects the provisions of the Code had been complied with, because having reached

the conclusion that the appellants' bond was defective, it was unnecessary to go further and base said order upon failure of the appellants to comply with other provisions of the Code clearly comprehended in appellee's motion to dismiss (Record, 11).

For some reason entirely *dehors* the matters that are properly before this Court on appeal the appellants rely on the efficacy of the plea of *nul tiel corporation* interposed in the proceedings before the justice of the peace, but it is manifest that whatever rights appellants may have had under such a plea were waived when they subsequently appeared, joined issue by another plea of *nil debet* and went into a hearing of the case on its merits. This proposition is too elementary to multiply authorities in support thereof. Black on Judgments, vol. 1, p. 213 ; L. & N. & C. v. Hall, 12 Bush (Ky.), 131.

That the provisions of the Code governing appeals from a justice of the peace were not complied with appears :

1. From the fact that a judgment of condemnation was entered by said justice on the 28th day of January, A.D. 1903, and no notice of appeal was filed or served on the appellee until the 4th day of February, A. D. 1903 (Record, 7), the sixth day after said judgment, exclusive of Sundays and legal holidays, had been rendered. Section 31 of the Code provides that the undertaking on said appeal must be given within six days, exclusive of Sundays and legal holidays, after the entry of judgment. The practice before justices governing such appeal is under section 32 of the Code regulated by the rules of the Supreme Court of the District. Rule 105, which by Rule 95 is made applicable to proceedings before justices of the peace, provides that no appeal bond shall be approved "except upon affidavit of two clear days' notice of application for such approval to the opposite party in interest;" and without such no-

tice such approval shall not be operative. That no such notice was given fully appears (Record, 7). It is conceded that if said appeal bond had been properly submitted for approval within the six days, it was within the province of said justice to approve after such prescribed time (Rule 93), but it is inconceivable that the two clear days' notice may be given on the very day the law provides the undertaking must be entered into; for this view would render nugatory the provisions of the Code as to filing an undertaking within six days from judgment.

Beall v. Cox, 14 App. D. C., 368.

U. S. *ex-rel.* &c., v. Clabaugh, 31 Wash. Law. Rep., 210.

"The statutory requirements can not be dispensed with by any court or judge without express authority of statute." (2 Pl. & Pr., 234.) "Unless an appeal is taken within the statutory period the court has no jurisdiction and the appeal is void for all purposes." (2 Pl. & Pr., 240.) "Where statutes require an appellant to make affidavit of merits or other facts to perfect appeal, the appellant acquires no jurisdiction unless the affidavit is made and filed strictly as the statute requires." (2 Pl. & Pr., 234.)

2. From the fact that the undertaking thus irregularly submitted was not such as to give the Supreme Court of this District any jurisdiction whatever over the case. Section 31 of the Code provides that the undertaking shall be "to satisfy and pay whatever final judgment may be recovered in the appellate court and agree that such judgment may be entered against principal and sureties."

The undertaking entered into by the appellants' garnishees before the justice contained no such provision: (Record, 9.)

The condition of the appeal bond must be as broad as the

statute and must include all the essential stipulations required by it.

1 Pl. & Pr., 983.

“No court or judge can alter the conditions (in a bond) named in the statute.”

1 Pl. & Pr., 985.

Xydias *vs.* State, 76 S. W. Rep., 794.

Harrington *vs.* Brown, 7 Pick. (Mass.), 232.

Santom *vs.* Ballard, 133 Mass., 464.

It is submitted that the cases cited in appellants' brief permit amendment of appeal bond only where the bond involved was a bail bond or where the statute to be construed was directory merely and failed to contain such a provision as is found in Section 31 of the Code, which provides that “no appeal shall be allowed unless,” etc.

Besides, the amended bond offered by the appellants to cure this grave defect was not actually executed until the fourth day of May, A. D. 1903 (Record, 16), when the motion for leave to amend was filed, although the motion to dismiss appeal had been pending since March 6, 1903.

“If the offer to file a new bond is not made in a seasonable time, it will be refused.”

Zanet De Onativa, 135 Cal., 440.

Newberg, &c., *vs.* Osburn, 39 Oregon, 370.

Cowperthwaite *vs.* Fulton, 27 S. W. Rep., 588.

It is, therefore, respectfully submitted that the order of the court below should be affirmed with costs.

E. HILTON JACKSON,

Attorney for Appellee.

